SUPREME COURT, U. S.
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JOHN F. DAVIS, C

No. 1216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ARTHUR C. ALLYN, JR.

Petitioner,

v.

ROBERT J. FLANNERY AND WILLIAM MOORE

ON PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS

PETITIONER'S REPLY BRIEF

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I
RESPONDENTS' ASSAULT ON PETITIONER'S GOOD FAITH IS UNJUSTIFIED.

Although the only question before the Court is whether certiorari should be granted, respondents have attacked the merits of petitioner's claim that he wrote the letter under the honest, though mistaken, belief that respondents had taken a bribe. (Resp. Br. 2-4, 11-12, 22-24.)

Whether petitioner wrote the letter with knowledge—or a high degree of awareness—that respondents had not taken a bribe is a question which would become pertinent only if this Court should decide (1) that the accusation was privileged under the *Times* rule and (2) that the privilege

was not waived by the failure of petitioner's counsel to raise the constitutional issue at trial—the substantive and procedural issues that warrant certiorari. Only then would this Court examine the record to see whether it would constitutionally support a finding of knowledge or reckless disregard of falsity—a requirement imposed by *Times* (376 U.S. at 284-285) which apparently leaves respondents "mystified" (Resp. Br. 4, 7).

Nevertheless, we cannot let respondents' misrepresentations of the record pass without comment.

The Appellate Court Made No Findings on Petitioner's Good Faith.

Respondents repeatedly assert that the Appellate Court "found" that petitioner knew that certain factual statements in petitioner's letter were untrue and that petitioner was neither "mistaken" nor "honest" in accusing respondents of soliciting a bribe. (Resp. Br. 2-4, 11-12, 22-23.) *The Appellate Court did no such thing.* Having ruled that the constitutional privilege had been waived, the Appellate Court's function was limited to determining "whether the evidence adduced by the plaintiffs in this case was, as a matter of law, sufficient to support a finding of actual malice [ill will or intent to injure] by the jury." (Pet. App. 43.) The Appellate Court concluded that it was possible for the jury to believe that petitioner had prejudged respondents' guilt and therefore intended to harm them (Pet. App. 45-46); but made no finding as to the sufficiency of such evidence under the new knowledge-or-reckless-disregard-of-falsity standard. Nor would the record have supported a finding of actual malice under the *Times-Garrison* standard.

The Record Shows Petitioner Honestly Believed Respondents Were Guilty.

Petitioner testified that he wrote the letter to Chief Otlewis because it seemed likely that the policemen had taken a bribe and he felt the matter should be reported to the proper authorities for investigation and disciplinary action. (R. 29-31, 33, 47-48.)

To impeach this testimony—and to show petitioner's knowledge or reckless disregard of the falsity of his accusation—respondents curiously rely on certain language used in petitioner's letter which, if anything, emphasizes the sincerity of his belief in respondents' guilt—however mistaken that belief may have been. (Resp. Br. 22-23.)

Whether the check was "solicited" directly from Dorothy or indirectly through Paul Power; whether the car was actually "speeding"; and whether the policemen said to make the check payable to "Cash" or "Cash, what else" are obviously irrelevant in determining whether petitioner believed respondents had taken a bribe. And, as the Appellate Court concluded (Pet. App. 46), petitioner's request for disciplinary action, coupled with his statement that the newspapers had not been advised, indicates that he had determined in his own mind that respondents were guilty. Only if petitioner had *not* believed respondents guilty would knowledge of falsity be established.

Moreover, even if the question of who suggested the check were significant, the record shows that petitioner did not know, when he wrote his letter, that the check had not been solicited by respondents but, instead, had been "volunteered" by Dorothy, in response to Paul Power's statement, after conferring with the policemen, that he needed the $15. Both petitioner and Dorothy testified unequivocally

that Dorothy had not told him she had volunteered the check. (R. 29, 31, 37-38.) And it was only after Sue Owens had testified (both on direct and cross-examination) that she had told petitioner no details beyond the fact that they had been stopped and Dorothy had given the policemen a check (R. 42, 44) that the colloquy relied on by respondents to show that petitioner knew Dorothy had volunteered the check took place (R. 44; Resp. Br. 23-24). Sue's testimony, taken in context, was merely that she did not remember telling petitioner that Dorothy had volunteered the check, but that it was a fact and whatever she had told petitioner would have been the truth. (R. 42-44.) Finally, even if Sue had told petitioner Dorothy had volunteered the check, the subtle significance of that fact wholly escaped petitioner; for he was under the impression that Sue had merely confirmed Dorothy's story. (R. 29, 46.)

In addition to the four phrases in petitioner's letter, respondents also seek evidence of petitioner's knowledge or reckless disregard of falsity in the allegation that, even if petitioner had known that respondents had done a favor for the young people, he would have written the letter and asked for disciplinary action. (Resp. Br. 4.) What the record actually shows is that, on deposition, petitioner said that he could not speculate on the kind of letter, if any, he would have written if he had known the truth. (Certified Record, pp. 306-308.) At trial, petitioner unequivocally testified that he would not have written an accusing letter to Chief Otlewis had he known the truth. (R. 30.) But, regardless of what the record shows, what petitioner would have done *if* he had known the truth is completely irrelevant in determining *whether* he knew the truth when he wrote the letter.

It is apparent that what respondents have done is to seize on the slim evidence used by the Appellate Court to support

the jury's verdict under the old ill-will (intent to injure) standard in an attempt to convince this Court that the case is unworthy of certiorari because the record shows knowledge or reckless disregard of falsity even under the *Times-Garrison* standard. But it is precisely because the old standard permitted liability to be predicated on a finding of intent to injure, even where such intent was based on a misunderstanding of the facts, that the old standard was held to be constitutionally insufficient. As the Appellate Court itself said (Pet. App. 35-36):

> A later United States Supreme Court decision, *Garrison* v. *Louisiana*, 379 U.S. 64, held that neither intent to injure nor lack of due care was sufficient to meet the constitutional test of the *Times* case, and that only an intent to injure *through the calculated use of a falsehood or the reckless disregard of truth* would destroy the constitutional protection. (Emphasis supplied.)

Whatever inferences of intent to injure may have been permissible from the evidence relied on by respondents under the old standard, there is nothing in this record or in the Appellate Court's opinion to indicate that petitioner intended to injure, "*through* the calculated use of a falsehood or the reckless disregard of truth," two policemen whom he did not even know and whom he had no reason to want to harm. (Emphasis supplied.) And there is nothing to shake our statement that petitioner honestly—though mistakenly—believed respondents had solicited a bribe.

II

RESPONDENTS' ATTEMPTS TO DISCREDIT PETITIONER'S WAIVER ARGUMENTS ARE SPECIOUS.

Respondents' reliance (Br. 7-8, 13) on such cases as *Pennsylvania R.R.* v. *Illinois Brick Co.*, 297 U.S. 447

(1937), which merely state the general rule that this Court will not review State court judgments resting on adequate State grounds, is misplaced. As the law stands today, it is clear that whether the defective instructions—including those requested by petitioner's trial counsel—could be attacked for the first time on appeal on constitutional grounds is a Federal question, the answer to which depends, *first*, on whether there was *necessarily* a procedural forfeiture under Illinois law (*Williams* v. *Georgia*, 349 U.S. 375, 383 (1955)) and, *secondly*, whether such a procedural forfeiture of a Federal constitutional right serves a legitimate State interest (*Henry* v. *Mississippi*, 379 U.S. 443, 447-448 (1965)).

Respondents' attempt to distinguish *Henry* on its facts, since the Federal constitutional question there was raised by defendant's motion for directed verdict at the close of the State's evidence, is also fruitless, for the contemporaneous-objection rule invoked by the Mississippi Supreme Court is no different in effect than the waiver rule involved here. The principle that State procedural defects cannot bar review by this Court unless they serve a legitimate State interest is the same in either case.

If, as respondents urge (Br. 5-7), it was really *Times*—and not the later *Garrison* case—that abolished ill will and intent to injure as evidence of actual malice, then respondents went to trial on a defective complaint, for there is no allegation that petitioner knew—or recklessly disregarded—the truth in making his bribery accusation. (The allegation in paragraph 5 of the complaint, when read in context and in conjunction with paragraph 4, that "defendant, well knowing the premises," falsely and maliciously libeled respondents clearly refers not to petitioner's knowledge of what really happened, as respondents would have the Court believe (Br. 7), but to his knowledge of respond-

ents' good names and reputations (R. 2)). As we pointed out in the petition (p. 20), a totally defective complaint can be challenged at any time under Illinois law. This proposition was acknowledged and explained—but found inapplicable—in *Gustafson* v. *Consumers Sales Agency,* 414 Ill. 235 (1953), which respondents have chosen to emphasize while ignoring the other cases cited in support of the rule. (Resp. Br. 8-9.)

On the other hand, if, as seems most likely, it was not until Garrison *that ill will and intent to injure were abolished as constitutional tests of actual malice, there was a post-trial change in the applicable law which can be raised for the first time on appeal under Illinois, as well as Federal, law—a proposition which respondents do not challenge.*

Thus, regardless of whether *Times* or *Garrison* changed the law, there was no waiver under Illinois law.

Even if there was a waiver under Illinois law, it was one which the Appellate Court had discretion to excuse under the Illinois fair-trial rule. It is true that *People* v. *Bender,* 20 Ill. 2d 45 (1960), the case which happens to be most closely analogous to this case on its facts because the injured party was allowed to challenge his own instructions on appeal, was a criminal case and that the fair-trial rule is expressly embodied in the Illinois Supreme Court's rules concerning instructions in criminal cases. However, the Illinois Supreme Court in *Bender* did not rely on the criminal rule and has shown no reluctance to invoke the fair-trial rule in the civil cases cited in our petition (pp. 22-23).

Respondents attempt to distinguish the civil cases on the ground that they involve the misconduct of opposing counsel during the course of trial. (Br. 11.) This was true in four of the five cases cited, but the fifth case, *Muscarello* v. *Peterson,* 20 Ill. 2d 548 (1960), involved a factual misrepre-

sentation by an insurance adjuster long before trial which plaintiff's counsel did not discover until the trial and which he did not raise until argument on the post-trial motion. This illustrates that the application of the fair-trial rule is not confined to any particular kind of error so long as it is so substantial as to work a real injustice.

Even if there was a waiver—and one which the Illinois courts had no discretion to excuse—it is not one which serves a legitimate State interest because it was not a conscious waiver and the error could be corrected at the appellate level by a judgment for petitioner without remand for new trial, without waste of judicial resources.

Respondents' claim (Br. 13) that there is nothing in the record to indicate petitioner's trial counsel was unaware of the *Times* case is true only in the sense that the Appellate Court denied leave to file trial counsel's affidavit. But a copy of the affidavit tendered to the Appellate Court is part of the record (Certified Record 505; Pet. App. 48) and even the Appellate Court accepted the fact that petitioner's trial counsel was not aware of *Times* at the time of trial (Pet. App. 36).

It would be a sorry procedure if a State Appellate Court could bar review by this Court by refusing to allow the filing of an affidavit which shows there was no conscious waiver of a known right. Actually, there is nothing unusual about using affidavits to supply facts concerning a waiver issue which do not otherwise appear of record. See *Williams* v. *Georgia*, 349 U.S. 375, 379-380 (1955); *Henry* v. *Mississippi*, 379 U.S. 443, 450 (1965); *Curtis Publishing Co.* v. *Butts*, 351 F.2d 702, 733 (5th Cir. 1965), certiorari granted, 385 U.S. 811 (1966).

III

RESPONDENTS' POSITION ON THE MEANING OF "PUBLIC OFFICIALS" CONFIRMS THE NEED FOR REVIEW.

Without citation of authority, respondents state (Br. 20):

> This Court's decisions themselves make it clear that the new rule does not apply to lower governmental employees.

It is true that some of the lower courts have taken the restrictive view that the *Times* rule is applicable only to criticism of high-ranking public officials. For example, in *Clark* v. *Pearson,* 248 F. Supp. 188, 193-194 (D.C. D.C. 1965), cited by respondents (Br. 19), the Court said that the *Times* rule was the obverse of the official-privilege rule reflected in *Barr* v. *Matteo,* 360 U.S. 564 (1959). *But this sort of attempt to limit* Times *was expressly rejected* by this Court in *Rosenblatt* v. *Baer,* 383 U.S. 75, 84, n. 10 (1966).

While *Rosenblatt* made it clear that *Times* was not limited in its application to high-ranking public officials, it is nevertheless true, as respondents point out (Br. 21), that there is no present authority *compelling* the treatment of these respondents as public officials who can be criticized in a letter to their commanding officer with impunity, absent knowledge or reckless disregard of falsity. We believe the logic of *Times* indicates that petitioner's criticism was privileged,* but so long as a substantial argument can be made

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* Respondents' attempts to belittle the importance of their function as police officers is reminiscent of a similar argument made by the police lieutenant in *Gilligan* v. *King,* 48 Misc. 2d 212, 215 (N.Y. S.Ct. 1965), but rejected by the court:

> Plaintiff argues, however, that he is not a "public official" within the meaning of the *Times* decision. He is not an elected official, nor even a candidate for election; he is not a governmental executive charged with responsibility in

to the contrary, the question is important enough to be resolved by this Court.

This is surely an unusual case. How often could there occur a combination of circumstances of the kind that led petitioner to believe that the policemen who took Dorothy's check had solicited a bribe? How often would a citizen have the interest and the courage to write the police chief? How often would the accused policemen decide to file a libel suit, even though exonerated? How often would the citizen be willing to carry a matter of principle through two trials, two appeals, a petition for leave to appeal to the Illinois Supreme Court, and a petition to this Court?

But the questions involved in this case are not unusual—the substantive "public official" question affects every citizen and his relationship with those who wield the police power and the procedural waiver question affects all cases tried in the wake of *Times* and before its full impact was articulated in *Garrison*.

Respectfully submitted,

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administering public affairs. He chooses to regard himself, together with thousands of other governmental employees, as "in the lower ranks of government employees." But the title for the office and the function it normally serves are not the only criteria for the determination of the extent of the qualified privilege. The relation of the alleged libel to his "official conduct", and the public interest or concern in the publication, are matters upon which the court placed great emphasis.